No. 16-1215

IN THE

Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,

Petitioner,

—v.—

R. SCOTT APPLING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAW PROFESSORS RICHARD AARON, LAURA BARTELL, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, VINCENT BUCCOLA, JESSICA GABEL CINO, LINDA COCO, LAURA NAPOLI COORDES, ROBERT D'AGOSTINO, IRINA FOX, BRUCE GROHSGAL, GEORGE KUNEY, LOIS LUPICA, NANCY B. RAPOPORT, KEITH SHARFMAN, MICHAEL SOUSA, LAURA M. SPITZ, AND ADRIAN WALTERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

A. The Controversy..... 3

B. Reasons to Uphold the Court Below 4

ARGUMENT..... 6

I. SECTION 523(a)(2) MERELY RE-ENACTED A STATUTE WHICH HAD A CONGRESSIONALLY AND JUDICIALLY SETTLED UNDERSTANDING THAT A STATEMENT REGARDING A SINGLE ASSET IS A STATEMENT RESPECTING FINANCIAL CONDITION, AND IT MUST BE IN WRITING TO GIVE RISE TO A NON-DISCHARGEABLE DEBT 6

A. Early History: The Act of 1867, the Act of 1898 and the 1903 Amendment..... 7

B. The 1926 Amendment: The Phrase "Materially False Statement in Writing . . . Respecting Financial Condition" First Appears in the Context of Barring Discharge of *All* Debts... 8

PAGE

C. The 1960 Amendment: Congress Confines "False Statement In Writing Respecting Financial Condition" to the Dischargeability of *Single* Debts ... 9

D. Case Law Uniformly Treated Statements about Single Assets as Statements Respecting Financial Condition..... 10

E. The Settled Case Law that Statements About Single Assets are "Statements Respecting Financial Condition" Governs § 523(a)(2) of the Bankruptcy Code which Merely Re-enacted § 17a(2) of the Bankruptcy Act 12

II. PETITIONER WOULD ESCAPE HAVING TO PROVE THE ELEMENTS OF § 523(a)(2)(B), WHICH CONGRESS CAREFULLY CRAFTED SO AS TO AVOID MISTAKEN DETERMINATIONS OF NON-DISCHARGEABILITY (AS MAY WELL HAVE HAPPENED IN THE PRESENT CASE)..... 14

A. Petitioner Would Render Nugatory the Explicit Statutory Requirements to Establish Non-Dischargeability.. 14

B. Statements Should be in Writing to Eliminate Doubt as to What was Actually Said – And There is Plenty of Doubt in this Case 15

PAGE

C. Petitioner Never Proved the Elements of § 523(a)(2)(B) 19

D. Petitioner's Umbrage Does Not Override the Statute 20

III. PETITIONER'S READING OF § 523(a)(2) LEADS TO ABSURD CONSEQUENCES 22

A. The Absurd Consequences 22

B. Petitioner's Reading Unreconciles Subsections (A) and (B) 24

IV. APPLING'S ALLEGED STATEMENTS ABOUT A TAX REFUND WERE DIRECTLY STATEMENTS *OF* (NOT MERELY RESPECTING) HIS FINANCIAL CONDITION BECAUSE THEY ASSERTED HE WAS SOLVENT IN THE EQUITY SENSE AND COULD PAY HIS DEBTS; THEREFORE, THE STATEMENTS WERE REQUIRED BY § 523(a)(2)(B) TO BE IN WRITING TO GIVE RISE TO A NON-DISCHARGEABLE DEBT 27

CONCLUSION 32

TABLE OF AUTHORITIES

PAGE(S)

Cases

Albinak v. Kuhn,
149 F.2d 108 (6th Cir. 1945) 11

In re Appling,
527 B.R. 545 (M.D. Ga., 2015) .. 17, 16, 21, 27

Appling v. Lamar, Archer & Cofrin, LLP (In re Appling),
848 F.3d 953 (11th Cir. 2017)..... 4

Babbit v. Sweet Home Chapter of Comtys for a Greater Or.,
515 U.S. 687 (1995)..... 23

In re Bandi,
683 F.3d 671 (5th Cir. 2012)..... 29

Bates v. United States,
522 U.S. 23 (1997)..... 24

Bragdon v. Abbott,
524 U.S. 624 (1998)..... 12

Clay v. United States,
537 U.S. 522 (2003)..... 24

Cohen v. De La Cruz,
523 U.S. 213 (1998)..... 13

Corley v. United States,
556 U.S. 303 (2009)..... 28

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000)..... 25

Fedorenko v. United States,
449 U.S. 490 (1981)..... 26

PAGE(S)

Field v. Mans,
516 U.S. 59 (1995) 20

Gleason v. Thaw,
236 U.S. 558 (1915) 14, 15

Gov't of Virgin Islands v. Aquino,
378 F.2d 540 (3d Cir. 1967) 17

Haggar Co. v. Helvering,
308 U.S. 389 (1940) 23

Matter of Haler,
708 F. App'x 836 (5th Cir. 2017) 29

Hall v. United States,
566 U.S. 506 (2012) 13

Hamilton v. Lanning,
560 U.S. 505 (2010) 13

Hibbs v. Wynn,
542 U.S. 88 (2004) 27

In re Hyman,
502 F.3d 61 (2d Cir. 2007) 14

In re Johns-Manville Corp.,
36 B.R. 727 (S.D.N.Y. 1984) 30

Kawaauhau v. Geiger,
523 U.S. 57 (1998) 14, 15

Kelly v. Robinson,
479 U.S. 36 (1986) 13

Lamie v. United States Trustee,
540 U.S. 526 (2004) 13

In re Licht,
45 F.2d 844 (E.D.N.Y. 1930) 11

PAGE(S)

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 12

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494 (1986) 13

Neal v. Clark, 95 U.S. 704 (1878) 14, 15

Radlax Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012) 27

Russello v. United States, 464 U.S. 16 (1983) 24, 26

Scott v. Smith, 232 F.2d 188 (9th Cir. 1956) 11

Shainman v. Shear's of Affton, Inc., 387 F.2d 33 (8th Cir. 1967) 11

Staples v. United States, 511 U.S. 600 (1994) 21

Tenn v. First Hawaiian Bank, 549 F.2d 1356 (9th Cir. 1977) 11

Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co., 549 U.S. 443 (2007) 13

United States v. Naftalin, 441 U.S. 768 (1979) 26

PAGE(S)

Universal Camera Corp. v. N.L.R.B.,
340 U.S. 474 (1951) 17

Zurich Specialties London, Ltd. v. Bickerstaff, Whately, Ryan & Burkhalter,
425 F. App'x 554 (9th Cir. 2011) 28

Statutes

11 U.S.C. § 101 29

11 U.S.C. § 101(32) 29

11 U.S.C. § 109 30

11 U.S.C. § 301 30

11 U.S.C. § 523 ..... 3, 13

11 U.S.C. § 523(a)(2) ..... *passim*

11 U.S.C. § 523(a)(2)(A) ..... *passim*

11 U.S.C. § 523(a)(2)(B) ..... *passim*

11 U.S.C. § 727 3

11 U.S.C. § 1141 3

11 U.S.C. § 1228(a) 3

11 U.S.C. § 1228(b) 3

11 U.S.C. § 1328(b) 3

Bankruptcy Amendment of 1903,
Pub. L. No. 57-62, 32 Stat. 797-98 (1903)
(repealed) 8

Bankruptcy Amendment of 1960,
Pub. L. No. 86-621,
74 Stat. 408, 409 (1960) (repealed) 10

PAGE(S)

Bankruptcy Act of Mar. 2, 1867, ch. 176, § 29, 14 Stat. 517 (1867) (repealed) 7

Bankruptcy Amendment of 1926, Pub. L. No. 69-301, 44 Stat. 662, 663-64 (1926) (repealed) 8

Bankruptcy Act of 1898 (the "Bankruptcy Act") ch. 541, 30 Stat. 5445 ..... 7, 8, 14, 15

Bankruptcy Act of 1938 (the "Chandler Act") Pub. L. No. 75-696 52 Stat. 840, 841-42 8

Bankruptcy Act of 1938 § 14c, former 11 U.S.C. § 32c 8

Bankruptcy Act § 14, former 11 U.S.C. § 32 11

Bankruptcy Act § 14b, former 11 U.S.C. § 32b 8

Bankruptcy Act § 14b(3), former 11 U.S.C. § 32b(3) 8, 11

Bankruptcy Act § 14(3), former 11 U.S.C. § 32c(3) 9, 10

Bankruptcy Act § 17, former 11 U.S.C. § 35 7

Bankruptcy Act § 17a(2), former 11 U.S.C. § 35a(2) 10, 11, 12

PAGE(S)

Rules

S. Ct. Rule 37 5

S. Ct. Rule 37.6 1

Legislative History

H.R. Rep. No. 86-4346 (1959) 9

H.R. Rep. No. 95-595 (1977) 12

Law Review Articles

Anita L. Allen, *Dredging Up The Past: Lifelogging, Memory and Surveillance*, 75 U.Chi.L.Rev. 47 (2008) 18

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Olin Guy Wellborn III, *Demeanor*, 76 Cornell L. Rev. 1075 (1991) 17

Treatise

1A Collier on Bankruptcy, ¶17.01 [3.1] (14th Ed., 1978) 9

Other

Restatement (Second) of Torts, § 525, cmt. b (1977)..... 7

INTEREST OF *AMICI CURIAE*[1]

The Amici are law professors who have devoted their careers to the study and teaching of bankruptcy law.[2] The Amici are particularly concerned by Petitioner's misinterpretation of § 523(a)(2) of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, (the "Code"), which wrongly maintains that a false *oral* statement describing a single asset gives rise to a non-dischargeable debt. As Amici will

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, including Amici Curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk, pursuant to Rule 37.6.

[2] The Amici are the following law professors who teach at the schools indicated next to their names: Richard Aaron, S.J. Quinney College of Law, University of Utah; Laura Bartell, Wayne State University Law School; Jagdeep S. Bhandari, Wake Forest University School of Law; Susan Block-Lieb, Fordham University College of Law; Vincent Buccola, The Wharton School, University of Pennsylvania; Jessica Gabel Cino, Georgia State University; Linda Coco, Barry University; Laura Napoli Coordes, Arizona State University; Robert D'Agostino, John Marshall Law School; Irina Fox, Creighton University School of Law; Bruce Grohsgal, Widener University Delaware School of Law; George Kuney, University of Tennessee College of Law; Lois Lupica, University of Maine School of Law; Nancy B. Rapoport, Carmen Turner, Gordon Professor of Law UNLV; Keith Sharfman, St. John's University School of Law; Michael Sousa, University of Denver College of Law; Laura M. Spitz, Cornell University; and Adrian Walters, Chicago-Kent College of Law.

show, Congress understood that § 523(a)(2) simply re-enacted statutory language already having a completely settled understanding that a statement about a single asset was a "statement respecting financial condition" which must be in writing in order to give rise to a non-dischargeable debt. Petitioner, however, overlooks the binding significance of the prior Legislative and Judicial history which gave that meaning to § 523(a)(2). Next, Petitioner eviscerates the protections of § 523(a)(2)(B) that were carefully crafted by Congress to prevent wrongful determinations of non-dischargeability (as may have happened in this case). Finally, Petitioner propounds a statutory construction that leads to absurd results, including that an oral lie about one asset would be non-dischargeable, but an oral lie about all assets and all liabilities comprising a balance sheet would be dischargeable.

Amici also submit, as an independent reason to uphold the court below, that even if, *arguendo*, Petitioner were correct that a statement respecting financial condition must refer to overall financial condition, Respondent's statements actually *were* statements about his overall financial condition because they amounted to a claim that he was solvent in the equity sense; *i.e.*, able to pay his debts.

SUMMARY OF ARGUMENT

A. The Controversy

At stake in this case is the dischargeability in bankruptcy of a debt owed by Respondent, H. Scott Appling ("Appling"). Appling incurred a debt to Petitioner, a law firm, for its services. Those services were supposedly obtained by means of false *oral* statements made to Petitioner by Appling regarding a single asset of Appling's, namely the amount and timing of a federal tax refund.

In a nutshell, 11 U.S.C. § 523(a)(2)(B) requires that statements "respecting the debtor's . . . financial condition" must (among other conditions) take the form of a "statement in writing" in order to give rise to a non-dischargeable debt.[3] Petitioner's core

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[3] 11 U.S.C. § 523(a)(2) provides in relevant part:

§ 523 Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing –

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

contention is that a statement about a single asset is *not* a statement "respecting the debtor's financial condition." Petitioner erroneously contends that the term "financial condition" only applies to one's overall financial condition, i.e., a balance sheet setting forth the sum of one's assets and liabilities. Pet'r Br. 26. Therefore, in Petitioner's mistaken view, § 523(a)(2)(B) is inapplicable, and Appling's allegedly false statement about a single asset need not have been in writing to be the basis of a non-dischargeable debt under § 523(a)(2)(A).

Respondent contends, as ruled by the court below, *Appling v. Lamar, Archer & Cofrin, LLP (In re Appling)*, 848 F.3d 953, 958-59 (11th Cir. 2017) (hereinafter, the *Opinion Below*), that a statement about a single asset is, as a matter of plain meaning, a statement "respecting", (that is "involving", "concerning", or "relating to") financial condition. Therefore, for the resulting debt to be non-dischargeable, such a statement must be a "statement in writing" as required by § 523(a)(2)(B). Hence, because Respondent's statement was merely oral, and not in writing, his debt is dischargeable. *Id.*, at 961.

B. Reasons to Uphold the Court Below

Amici do not intend to present an analysis of the plain meaning of "respecting" that duplicates arguments advanced by Respondent or that were

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(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; . . .

given as a *ratio decidendi* by the court below. *See*, S. Ct. Rule 37. Amici respectfully submit that while such arguments are dispositive, there are additional reasons to rule in favor of Respondent as follows:

First, § 523(a)(2) merely re-enacted language from the prior Bankruptcy Act as to which there was a settled Congressional and Judicial understanding that a statement about a single asset is a statement respecting financial condition which must be in writing to establish a non-dischargeable debt. Under principles laid down by this Court, that settled understanding governs the meaning and operation of § 523(a)(2).

Second, Petitioner's position avoids Petitioner having to prove the elements of § 523(a)(2)(B), which Congress carefully crafted to avoid mistaken determinations of non-dischargeability. The requirement of a writing, with which Petitioner would dispense, is designed to avoid exactly what happened here: a determination based on subjective evaluations of the credibility of witnesses recounting oral conversations almost ten (10) years after the fact. Further, Petitioner never proved (and on its interpretation of the statute would escape *ever* having to prove) the other requirements of § 523(a)(2)(B): materiality, reasonable reliance, and intent to deceive. Moreover, importantly, Petitioner's repetitive denigration of Mr. Appling's honesty does *not* change the requirements of the statute.

Third, Petitioner's overall reading of § 523(a)(2) leads to absurd outcomes as to which debts are non-dischargeable, including that a debt arising from an oral lie about a single asset is not

dischargeable, whereas the debt arising from an oral lie about *all* assets and liabilities would be dischargeable. Rejecting Petitioner's fundamental misinterpretation of the statute not only means that Appling's debt is dischargeable, but leads to a clean, coherent meaning of the statute that avoids bizarre outcomes described herein.

Lastly, Respondent's alleged statement about a tax refund was directly a statement *of* (not merely "respecting") his financial condition, because that statement addressed his ability to repay the indebtedness to the Petitioner and amounted to a declaration of his overall solvency in the equity sense. Petitioner cannot credibly dispute that it understood Respondent's statement in exactly that way when it extended credit to him. Therefore, even on Petitioner's misinterpretation of § 523(a)(2)(A) and (B), Appling's debt is dischargeable because he did not make any statement in writing.

ARGUMENT

POINT I

SECTION 523(a)(2) MERELY RE-ENACTED A STATUTE WHICH HAD A CONGRESSIONALLY AND JUDICIALLY SETTLED UNDERSTANDING THAT A STATEMENT REGARDING A SINGLE ASSET IS A STATEMENT RESPECTING FINANCIAL CONDITION, AND IT MUST BE IN WRITING TO GIVE RISE TO A NON-DISCHARGEABLE DEBT

11 U.S.C. § 523(a)(2), enacted in 1978 as part of the Bankruptcy Code, Pub.L. No. 95-598, 11

U.S.C. § 101 *et seq.*, re-enacted provisions in the Bankruptcy Act of 1898, as amended. Case law addressing those provisions was settled that a statement about a single asset is a statement respecting financial condition, and it must be in writing for there to be a non-dischargeable debt. In amending the Bankruptcy Act, Congress clearly had that understanding. That understanding governs § 523(a)(2).

A. Early History: The Act of 1867, the Act of 1898 and the 1903 Amendment

The bankruptcy legislation of 1867 designated fraudulent debt as unaffected by a discharge. *See*, Act of Mar. 2, 1867, ch. 176, § 29, 14 Stat. 517 (1867) (repealed) ("Act of 1867"). At common law frauds could be committed by purely oral, as well as written, statements, *see generally*, Restatement (Second) of Torts, § 525, cmt. b (1977), and the Act of 1867 drew no distinction between oral and written frauds.

The Bankruptcy Act of 1898 (the "Bankruptcy Act"), as enacted in that year, addressed debts arising from frauds in Section 17, former 11 U.S.C. § 35, and provided for the non-dischargeability of certain particular debts, in relevant part, as follows:

> A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments in actions for frauds or obtaining property by false pretenses or false representations . . .; or (4) were created by his fraud, embezzlement . . . .

Once again, as in the 1867 Act, there was no distinction in the 1898 Act between written and oral statements.

In 1903, the Bankruptcy Act was amended to provide four grounds within Section 14b of that Act upon which a court could deny discharge of all debts, not merely of particular debts. Included in these new grounds was obtaining credit by a materially false *writing*. Act of February 5, 1903, Pub. L. No. 57-62, ch. 487, § 4, 32 Stat. 797-98 (1903) (repealed) (denying discharge to a debtor who "(3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit . . ."). This was the first reference to "false statement in writing" in the Bankruptcy Act, and is an obvious precursor to 11 U.S.C. § 523(a)(2)(B).

B. The 1926 Amendment: The Phrase "Materially False Statement in Writing . . . Respecting Financial Condition" First Appears in the Context of Barring Discharge of *All* Debts

In 1926, Congress amended what was then Section 14b(3) of the Bankruptcy Act[4] to create an outright bar to the discharge of *all* debts if the bankrupt had "[o]btained money or property or credit . . . by making or publishing . . . a materially false statement in writing respecting his financial condition." Former 11 U.S.C. § 32b(3) created by the Act of May 27, 1926, Pub.

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[4] The Bankruptcy Act of 1938, frequently called the Chandler Act, Pub. L. No. 75-696, subsequently caused Section 14b to be renumbered as Section 14c.

L. No. 69-301, ch. 6 § 6, 44 Stat. 662, 663-64 (repealed). This amendment was the first statutory usage of the phrase "respecting financial condition." It also had the effect of making false written statements of financial condition a basis for denial of discharge of *all* debts, not just the dischargeability of the specific debt.

C. The 1960 Amendment: Congress Confines "False Statement in Writing Respecting Financial Condition" to the Dischargeability of *Single* Debts

By 1960, Congress had come to believe that complete denial of discharge as provided by the 1926 amendment "was too severe a penalty in the case of an individual noncommercial bankrupt." H.R. Rep. No. 86-4346, at 2 (1959). Congress also expressed concern that unscrupulous lenders were inviting false financial statements through the use of forms easily designed to cause omissions, *Id.*, but this was not its sole concern, as Petitioner erroneously seems to imply. *See*, Pet'r Br. 10.

As a result of those concerns, Congress in 1960 decided to eliminate false *written* financial statements regarding a debtor's financial condition as a ground for the denial of a discharge for non-business individual debtors and amended § 14c(3) to that effect. However, as *1A Collier on Bankruptcy*, ¶17.01 [3.1] at 1578 (14th Ed. 1978) notes, in the wake of that amendment, "it [then] became important to make certain that the obtaining of money, property or credit by use of such [written] false statements [still] resulted in a non-dischargeable debt."

Congress achieved that aim by adding the following basis for non-dischargeability of a debt to § 17(2) in its 1960 amendment:

> [O]r for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement *in writing* respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive . . . .

Act of Jul. 12, 1960, Pub. L. No. 86-621, Sec. 2, § 17(2), 7 Stat. 408, 409 (1960) (repealed) (emphasis added).

The substance of the 1960 amendment, therefore, was to remove from § 14c(3)[5] false written statements as a predicate for denial of a general discharge, and to import false written statements into § 17a(2) as an exception to dischargeability of only those specific debts predicated on such written statements.

D. Case Law Uniformly Treated Statements about Single Assets as Statements Respecting Financial Condition

Section 17a(2) of the Bankruptcy Act was the direct precursor to § 523(a)(2) of the Bankruptcy Code, both of which use the term, "statement in writing respecting . . . financial condition". Accordingly, case law developed between 1926 and 1960 under § 17a(2), and its predecessor, namely § 14(c)(3), illuminates statutory meaning.

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[5] I.e., former § 14(b) but renumbered by the Chandler Act. *See* note 4, *supra*.

Cases during that era uniformly held that a statement regarding a single asset was a statement about financial condition.

Cases decided under § 14c(3), before its language was imported into § 17a(2) by the 1960 Amendment, held that a statement regarding a single asset is a statement about financial condition. *See, Scott v. Smith*, 232 F.2d 188, 190 (9th Cir. 1956) (implied representation of control over property is a statement "reflecting his financial condition"); *Albinak v. Kuhn*, 149 F.2d 108, 110 (6th Cir. 1945) ("[N]o cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one's financial condition as limited to a detailed statement of assets and liabilities."); *In re Licht*, 45 F.2d 844, 846 (E.D.N.Y. 1930) (§ 14b(3) would apply if the bankrupt had made a materially false statement about "any . . . part" of his property, giving a single real estate asset as an example).

Moreover, courts applying § 17a(2) following the 1960 amendment likewise understood that the language had been imported from § 14, and therefore continued to hold that a materially false statement about a single asset constituted a statement about financial condition. *See, Shainman v. Shear's of Affton, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967) ("[S]tatement purporting to set forth the value of a major asset, inventory, is a statement respecting the financial condition . . ."); *Tenn v. First Hawaiian Bank*, 549 F.2d 1356, 1357-58 (9th Cir.) (*per curiam*) (recording of a false deed to obtain credit on the basis of an asset not owned is a false statement of financial condition).

The case law appears to be uniform and settled. No contrary authority was located through diligent research.

E. The Settled Case Law that Statements About Single Assets are "Statements Respecting Financial Condition" Governs § 523(a)(2) of the Bankruptcy Code Which Merely Re-Enacted § 17a(2) of the Bankruptcy Act

Section 523(a)(2) re-enacted § 17a(2) of the Bankruptcy Act, using identical language. The legislative history notes that § 523(a)(2) "continues the exception to discharge based on a false statement in writing concerning the debtor's financial condition." *See*, H.R. Rep. No. 95-595, at 129 (1977). The prior history of that term clearly shows that statements about single assets were understood as statements "respecting a debtor's financial condition."

That understanding carried over into the Bankruptcy Code when it was enacted in 1978. It is a general principle that when Congress re-enacts legislation, it adopts settled judicial interpretations. As this Court has held:

> When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.

Bragdon v. Abbott, 524 U.S. 624, 645 (1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) ("Congress

is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . ."); *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); *Kelly v. Robinson*, 479 U.S. 36, 46-7 (1986).

When it enacted § 523, Congress did nothing to indicate it was changing the law; on the contrary, the legislative history noted above indicates Congress was *continuing* the law. Therefore, for purposes of § 523(a)(2), a statement regarding a single asset is a statement respecting financial condition that must be in writing to be non-dischargeable.

Moreover, it is a general principle that practices under the Act carry through under the Code unless clearly changed by the Code. *See, Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (stating that basic bankruptcy practices should not be eroded absent "[c]lear indication that Congress intended such a departure"); *accord, Hall v. United States*, 566 U.S. 506, 518 (2012); *Hamilton v. Lanning*, 560 U.S. 505, 516 (2010); *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 454 (2007); *Lamie v. United States Trustee*, 540 U.S. 526, 539 (2004).

There is no indication whatsoever that Congress intended any departure. The only indication is the opposite, that Congress

intended no departure. Therefore, Respondent should prevail in this matter.

POINT II

PETITIONER WOULD ESCAPE HAVING TO PROVE THE ELEMENTS OF § 523(a)(2)(B), WHICH CONGRESS CARE-FULLY CRAFTED SO AS TO AVOID MISTAKEN DETERMINATIONS OF NON-DISCHARGEABILITY (AS MAY WELL HAVE HAPPENED IN THE PRESENT CASE)

A. Petitioner Would Render Nugatory the Explicit Statutory Requirements to Establish Non-Dischargeability

This Court has long held, both under the Bankruptcy Act of 1898, and under the current Bankruptcy Code, that exceptions to discharge should be "confined to those plainly expressed." *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) ("*Kawaauhau*") (Code case); *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("*Gleason*") (Act case). *See also*, *Neal v. Clark*, 95 U.S. 704, 709 (1878) ("*Neal*") (Act case) (noting the "liberal spirit which pervades the entire bankruptcy system"). Thus, expansive readings which would render debts non-dischargeable when that outcome is not "plainly expressed" are to be avoided. To hold otherwise invites a brutal consequence for the debtor: "[I]n many instances, failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007).

Congress has, however, "plainly expressed" in § 523(a)(2)(B) *exactly* what is needed to render non-dischargeable a debt arising from a false statement respecting a debtor's financial condition: (i) the statement must be in writing; (ii) it must be materially false; (iii) the creditor must reasonably rely on it; and (iv) the debtor must have published it with intent to deceive. Petitioner in this case would dispense with proving any of those requirements, thereby vastly expanding the universe of non-dischargeable debts in direct contravention of the principles set forth by this Court in the *Kawaauhau*, *Gleason*, and *Neal* cases, *supra*.

B. Statements Should be in Writing to Eliminate Doubt as to What was Actually Said – And There is Plenty of Doubt in This Case

A basic rationale for requiring that a statement respecting financial condition be in writing is to establish with certainty what statement was in fact made. That rationale was widely understood contemporaneously with the passage of the 1898 Bankruptcy Act:

> In the case of an oral statement, there is always more or less doubt as to the representation made, and it would cause much conflict of testimony and consume much time of [bankruptcy] referees and courts, with no certainty of a correct result, if such statements were made grounds for denying the discharge.

Henry Newton, *United States Bankruptcy Law of 1898*, 9 Yale L.J. 287, 293-9 (1900). As the court below recognized, the Bankruptcy Code "imposes

different requirements of proof for different kinds of statements. A statement respecting a debtor's financial condition must be in writing, which helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." *Opinion Below*, 848 F.3d at 960.

In this case, Lamar, a law firm, could easily have asked for a statement in writing, thereby eliminating any legal question about the need for a writing while also creating clear and reliable evidence as to what was said. Instead, there was a trial that produced a morass of conflicting testimony as to what Respondent supposedly said. Walter Gordon, a witness for Petitioner testified that "[Respondent] represented . . . he was going to get a substantial [tax] refund . . . in excess of $100,000, and that he would pledge it as soon as it came in, that . . . he would be able to pay the fees out of that refund."[6] JA 54-55. Appling, however, testified: ". . . what I told Mr. Gordon and Mr. Lamar [is] that I didn't know what I'm getting back, there's a potential I get $100,000; if I get $100,000 I should be able to pay your bill." *Id.*, at 115. To further complicate the "he said, he said" nature of the evidence, the relevant discussions about which testimony was being given occurred nearly *ten* years earlier.[7]

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[6] Remarkably, Lamar, a lawyer, made no contemporaneous notes of his and Mr. Gordon's meeting with Appling, and did not send Appling a confirmatory letter. JA 81-82.

[7] Trial testimony was given on September 18, 2014, JA 31; meetings at which false statements were supposedly made occurred in March, 2005, JA 34, and November, 2005, JA 36.

The trial court resolved the conflicting testimony based partly on the demeanor of the witnesses. *See, In re Appling*, 527 B.R. 545, 553 (M.D. Ga., 2015) ("Having heard the evidence, observed the demeanor of the witnesses, and reviewed the documents introduced, the court finds . . .").

Amici acknowledge that traditionally, the law has regarded a witness's demeanor as probative of honesty. *See, e.g., Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 495-96 (1951) (demeanor traditionally believed to furnish "valuable clues"). Lower courts have occasionally been more forceful. *See, e.g., Gov't of Virgin Islands v. Aquino*, 378 F.2d 540, 548 (3d Cir. 1967) (demeanor "of utmost importance" in determining witness credibility).

However, modern sociological and psychological research suggests that demeanor is not a reliable indicator of whether a witness is telling the truth:

> [T]he experimental evidence indicates that ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging when someone is lying. There is no evidence that facial behavior is of any benefit; some evidence suggests that observation of facial behavior diminishes the accuracy of lie detection. . . . With respect to body cues, there is no persuasive evidence to support the hypothesis that lying is accompanied by distinctive body behavior that others can discern.

Olin Guy Wellborn III, *Demeanor*, 76 Cornell L. Rev. 1075, 1088 (1991).

Of course, a trial judge has to resolve conflicting testimony on some basis. But if all a judge has to go on is demeanor, a conscientious judge can, in complete good faith, get it wrong by sincerely disbelieving the right party or sincerely believing the wrong party.

Another factor that affects the reliability of testimony is lapse of time. Memories fade, but the human tendency to fill in gaps is well documented:

> Biological memory serves us well, but it is *highly* selective and fallible. We do not remember all of our conscious experiences; we mis-remember many of our experiences; and memory fades over time. Even what is objectively memorable can be forgotten.

Anita L. Allen, *Dredging Up The Past: Lifelogging, Memory and Surveillance*, 75 U. Chi. L. Rev. 47, 50 (2008) (emphasis added).

Thus, a witness can easily give false testimony in the sincere belief that he is being truthful because he honestly believes his faulty memory to be accurate, or perhaps has unconsciously filled in erroneous details. A conscientious judge acting in good faith might well be persuaded by testimony given sincerely but that is nevertheless wrong.

Even though that may well have happened here, whether it did is not the question before the Court. But what *is* before the Court is a question the resolution of which will have a profound impact on the reliability of future non-dischargeability determinations. A ruling in

favor of Respondent that requires any statement about financial condition to be in writing reduces the risk of sincerely decided but wrong outcomes in cases where the only evidence is conflicting oral testimony.

C. Petitioner Never Proved the Elements of § 523(a)(2)(B)

Petitioner's interpretation of § 523(a)(2) deftly sidesteps any inquiry into its own behavior and avoids having to prove the elements in § 523(a)(2)(B) required to establish the non-dischargeability of a debt, elements which it might very well not be able to prove. Amici fully understand that the inquiry in this case turns solely on whether Respondent's statement had to be in writing, but Amici are deeply concerned that a ruling for Petitioner would have the untoward effect of facilitating unscrupulous or careless creditors in obtaining future determinations of non-dischargeability.

Beyond there being no statement in writing in this case, the absence of other elements of § 523(a)(2)(B) is conspicuous. Suppose, *arguendo*, that Respondent had put a false statement in writing. There would still be an important question of fact in this case whether Petitioner "reasonably relied" as required by that provision. After all, Petitioner is a law firm to whom statements were being made about a tax refund. Some due diligence would certainly seem in order – examples include asking to see Respondent's tax return and seeking to understand the substantive legal basis for a refund claim. Instead, Mr. Lamar explicitly acknowledged that he did not seek an assignment of the refund,

stating, "I simply trusted my client, Mr. Appling." JA 82. In the circumstances of this case, there is a very real question whether the simplicity of trust was reasonable.

Notably, while § 523(a)(2)(B) imposes an express requirement that the creditor "reasonably relied" on a false statement, this Court has imposed a standard of "justifiable reliance" under § 523(a)(2)(A). *Field v. Mans*, 516 U.S. 73, 77 (1995). Amici submit that the record does not even support that there was justifiable reliance by Lamar, much less the higher standard of "reasonable reliance" imposed by 11 U.S.C. § 523(a)(2)(B). As this Court said, "Naifs may recover at common law and in bankruptcy, but lots of creditors are not at all naïve." *Id.*, at 76. It is fair to assume that Lamar, a law firm, is not at all naïve.

D. Petitioner's Umbrage Does Not Override the Statute

Petitioner repeatedly attacks Respondent as a liar. Pet'r Br. 2 and *passim*. Petitioner repeatedly invokes the claim that Respondent's alleged lies make him unworthy to discharge his debt to Petitioner because the benefits of bankruptcy are reserved for the honest debtor. *Id.*, at 5 and *passim*.

In the first place, Respondent's honesty or dishonesty has no bearing on the issue now before the Court, namely whether a statement by a debtor about a single asset is "a statement respecting the debtor's financial condition." Beyond that, however, Petitioner's sanctimonious attack obscures a fundamental flaw in Petitioner's position. The flaw is that § 523(a)(2)(B) sets up

numerous conditions, *all* of which must be met to deny dischargeability. Falsity and intent to deceive are only two of them, but they are not sufficient to satisfy § 523(a)(2)(B). The whole point and operation of that statute is to require *more* than a lie. The reality is that some dishonesty does not lead to a loss of discharge. "Thus, a debt incurred by an oral fraudulent statement respecting the debtor's financial condition can be discharged." *Opinion Below*, 848 F.3d at 957.

Sainthood is not a requirement to qualify for the benefits of bankruptcy, and puritanical mantras about "honest" debtors cannot override the express provisions of the statute Congress chose to enact. As the court below put it, "[a] distaste for dishonest debtors does not empower judges to disregard the text of the statute." *Id.*, at 960.

Moreover, Amici urge that application of § 523(a)(2)(B) to this case best carries out this Court's mandate not to extend exceptions to discharge beyond those "plainly expressed." If Congress had intended that oral statements about a single asset were to be non-dischargeable under § 523(a)(2), despite its uniform requirement of a writing throughout its bankruptcy legislation, "it would have spoken more clearly to that effect." *Staples v. United States*, 511 U.S. 600, 620 (1994). After making its intent clear to require a writing under the Bankruptcy Act's provisions, which it carried into § 523(a)(2), Congress would not have intended to quietly smuggle into § 523(a)(2)(A) a provision to deny the discharge of the debt arising from an oral

false statement about the debtor's financial condition.

Here, not only was Respondent's alleged statement *not* in writing, but none of the other elements of § 523(a)(2)(B) were proven, or even the subject of findings of fact, except falsity (and intent to deceive, but only with respect to some statements). Therefore, in light of the pre-Code statutory history discussed above, and in light of the uniform case law that statements about a single asset are statements respecting financial condition, and considering uniform case law *against* expansive constructions of non-dischargeability provisions, it is clear that Respondent's debt is dischargeable, and the decision below should accordingly be affirmed.

POINT III

PETITIONER'S READING OF § 523(a)(2) LEADS TO ABSURD CONSEQUENCES

A. The Absurd Consequences

Petitioner's essential contention is that a false oral statement concerning a single asset is *not* a statement respecting the debtor's financial condition; therefore, Petitioner concludes, such a statement is *not* subject to § 523(a)(2)(B) and does *not* have to be in writing to create a non-dischargeable debt. Pet'r Br. 22. But if, as Petitioner urges, a statement about a single asset is not a statement "respecting financial condition," then absurd consequences follow.

It is fundamental that statutes should not be construed in a way that leads to absurd or perverse outcomes. Assuming, *arguendo*, the Petitioner's reading is the literal, plain meaning

of the statute, then nevertheless that literal, plain meaning is still to be avoided if it leads to absurd results. *See, Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *cf., Babbit v. Sweet Home Chapter of Comtys for a Greater Or.*, 515 U.S. 687, 701 (1995) (terms to be defined so as not to cause absurd results). Accordingly, Petitioner's construction of § 523(a)(2) should be rejected for the reason that it generates absurd results described below.

First, under Petitioner's reading of § 523(a)(2)(A), an oral misrepresentation about the worth of a single asset (a little lie) creates a non-dischargeable debt, but an oral misrepresentation of overall net worth falsely describing all assets and all liabilities (a big lie) *would* result in a dischargeable debt. This is so because even Petitioner has to concede that an oral lie about *overall* net worth would not be non-dischargeable under § 523(a)(2)(B) since there is no writing. But as Petitioner concedes, a lie about *overall* net worth is a statement of financial condition, and thus such statement is outside the scope of § 523(a)(2)(A) as well. It is, however, absurd that a small oral lie creates a non-dischargeable obligation and a big oral lie results in a dischargeable obligation.

Second, if Petitioner's interpretation were correct that statements about a single asset are not statements respecting financial condition, then even a written material false misrepresentation about a single asset on which a creditor reasonably relies would not fall within § 523(a)(2)(B). But that creates an absurd carve-out from the plain and literal language of § 523(a)(2)(B) which explicitly encompasses written statements. It is

absurd that Congress would put some written statements under the purview of § 523(a)(2)(A) when *only* subsection (B) refers to "use of a statement in writing." As this Court has repeatedly stated, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see also, Bates v. United States*, 522 U.S. 23, 29-30 (1997) (same) (citations omitted); *Clay v. United States*, 537 U.S. 522, 523, 528-39 (2003) (same) (citations omitted). Petitioner's interpretation violates that canon and also leads to an absurdity. Its construction of § 523(a)(2)(B) should be rejected for this reason alone.

B. Petitioner's Reading Unreconciles Subsections (A) and (B)

It is Petitioner's foundational misconstruction of the statute that generates absurd results, and the misconstruction is the failure to harmonize sub-subsections (A) and (B). Petitioner views some statements relevant to financial condition as being outside the purview of sub-subsection (B) and instead captured by subsection (A). Yet, it offers no principled basis for determining which statements are subject to sub-subsection (A) and which are subject to sub-subsection (B). Is a statement of *all* assets, but which is silent as to liabilities governed by (A) or (B)? What about a statement of *all* liabilities, but which is silent

as to assets? Or a statement about *only* material assets or about *only* material liabilities?[8]

Neither Petitioner, nor the legislative history, nor case law resolves those questions. What *does* resolve those questions is adhering to the plain meaning of the statute. If a statement "respects" (that it involves, relates to, concerns or pertains to) financial condition, then it is governed by sub-subsection (B) and must be in writing to give rise to a non-dischargeable debt, irrespective of whether that statement is about one asset, some assets, most assets, material assets, or all assets. Unless the statute is read according to its plain text, one inevitably becomes enmeshed in creating distinctions and dividing lines as to which Congress gave no indication that it ever intended, and which unnecessarily tangle what is actually a very simple, workable and straightforward statutory scheme that limits non-dischargeability for statements about any aspect of financial condition to false written statements meeting the requirements of § 523(a)(2)(B). As this Court stated in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000):

> A court must . . . interpret [a] statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into a harmonious whole." (citations omitted)

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[8] Petitioner baldly asserts that its construction of the statute "will not create any line-drawing problems." Pet'r Br. 21. That assertion is simply incorrect.

Petitioner's construction of § 523(a)(2) is the opposite of that interpretive principle. Petitioner sets subsections (A) and (B) against each other, which alone is a reason to reject Petitioner's reading of that statute. Petitioner does this by saying that subsection (A) impliedly covers oral statements respecting financial condition, even though the plain meaning is crystal clear that statements respecting financial condition must be in writing to give rise to a non-dischargeable debt. Petitioner accomplishes this maneuver by urging that statements about a single asset are not statements of financial condition. Had Congress wanted § 523(a)(2)(A) to operate as an exception to § 523(a)(2)(B), it would presumably have done so expressly and could have done so easily. *See, Russello v. United States, supra,* 464 U.S. at 23. However, "[t]he short answer is that Congress did not write the statute that way." *See, United States v. Naftalin,* 441 U.S. 768, 773 (1979). Indeed, Congress actually wrote the statute the opposite way, with subparagraph (B) operating as the exception to subparagraph (A). As this Court has stated, "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . To [so] hold . . . is not to construe the Act but to amend it." *Fedorenko v. United States,* 449 U.S. 490, 513 (1981).

To hold that subparagraph (A), a general provision, prevails over subparagraph (B), a specific provision, so as to allow the nondischargeability of a debt arising from an oral statement about the debtor's financial condition, would also violate the canon of construction that a specific provision is presumed

to prevail over a general provision absent a clear contrary indication by Congress, which does not exist in this case. *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general.").

Amici respectfully urge this Court to apply the statute as written, and not as contorted by Petitioner. The decision below should be affirmed.

POINT IV

APPLING'S ALLEGED STATEMENTS ABOUT A TAX REFUND WERE DIRECTLY STATEMENTS *OF* (NOT MERELY RESPECTING) HIS FINANCIAL CONDITION BECAUSE THEY ASSERTED HE WAS SOLVENT IN THE EQUITY SENSE AND COULD PAY HIS DEBTS; THEREFORE, THE STATEMENTS WERE REQUIRED BY § 523(a)(2)(B) TO BE IN WRITING TO GIVE RISE TO A NON-DISCHARGEABLE DEBT

The Court below rightly held that a statement about a single asset is one "respecting" (that is, involving, concerning, or relating to) "financial condition." Not only is that true based on plain meaning as reflected in dictionary definitions, but it also gives the word "respecting" a linguistic role. *See, Opinion Below*, 848 F.3d at 958 ("We must not read the word 'respecting' out of the statute."). It is a basic canon of statutory construction that statutes are to be read so as to give every word meaning. *See, Hibbs v. Wynn*,

542 U.S. 88, 101 (2004); *Corley v. United States*, 556 U.S. 303, 314 (2009).

Amici thus believe the Court below reached the correct result, but offer the following additional analysis. Amici submit that "financial condition," as used in § 523(a)(2)(B), is not confined to balance sheet solvency. It extends to solvency in the equity sense as well; that is, it extends to the debtor's ability to repay its debts as they come due. The use of "solvency" to include solvency in the equity sense is well recognized in case law in many contexts. *See, e.g., Zurich Specialties London, Ltd. v. Bickerstaff, Whately, Ryan & Burkhalter*, 425 F. App'x 554, 556 (9th Cir., 2011) ("[L]egal definition of insolvency describes an ongoing process in which an entity is unable to meet its liabilities as they mature.").

Ironically, even authorities on which Petitioner relies implicitly accept that insolvency may be defined in the equity sense as well as in the balance sheet sense. The *Bandi* case, on which Petitioner relied in its Petition for Certiorari at 19 (but which it has chosen not to cite again in its Merits Brief), stated in the opinion: "A representation that one owns a particular residence or a particular commercial property says nothing about the overall financial condition of the person making the representation *or of the ability to repay debt.*" *In re Bandi*, 683 F.3d 671, 676 (5th Cir. 2012), *cert. denied*, 568 U.S. 1086 (2013) (emphasis added). Thus, even according to Petitioner's authorities, statements about the

ability to repay debt would count as statements of financial condition.[9]

Indeed, in the wake of the Fifth Circuit's decision in *Bandi*, even the Fifth Circuit itself has very recently held that an oral statement by a debtor that it had "plenty of cash to operate [its] business" was a statement of financial condition. *Matter of Haler*, 708 F. App'x 836, 840 (5th Cir. 2017). Moreover, the Court went on to hold that "[t]hese oral representations were statement[s] respecting ... financial condition and thus did not render the debt non-dischargeable under § 523(a)(2)(A). *Id.*, at 841. (ellipsis in original).

It is true that the Bankruptcy Code defines "insolvent" in terms of balance sheet assets and liabilities. *See*, 11 U.S.C. § 101(32)(A) and (B) although insolvency for municipalities is defined in the equity sense. *See* § 101(32)(C). However, those definitions can only apply to a particular provision of the Bankruptcy Code if the word "insolvent" is actually used in that provision. However, the word "insolvent" does not appear in § 523(a)(2)(A) or (B). There is simply nothing about the Bankruptcy Code's definition of "insolvent" being framed as a balance sheet test in § 101(32)(A) and (B) which requires that the term "financial condition" in § 523(a)(2)(B) be understood as restricted to a balance sheet definition of solvency. Similarly,

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[9] Whether the statement at issue in the *Bandi* case was a statement of financial condition is beside the point; what matters is its implicit recognition of the principle. In the instant case, it is beyond doubt that Appling's alleged statements about the tax refund were directly statements about his ability to repay debt.

there is simply nothing about the Bankruptcy Code's definition of "insolvency" being framed in the equity sense in § 101(32)(C) that precludes applying "solvency" in the equity sense to the concept of "financial condition" as used in § 523(a)(2).

Notably, the Bankruptcy Code does not impose a balance sheet test for filing bankruptcy. *See generally*, 11 U.S.C. §§ 109, 301; *cf.*, *In re Johns-Manville Corp.*, 36 B.R. 727, 732 (S.D.N.Y. 1984), *leave to appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984), *reh'g. denied*, 39 B.R. 998 (S.D.N.Y. 1984), *mandamus denied*, 749 F.2d 3 (2d Cir. 1984) (no insolvency requirement to file Chapter 7 or Chapter 11 bankruptcy). Indeed, many individuals and entities file for bankruptcy relief because of their inability to pay their debts as they become due. Consequently, solvency either in the balance sheet sense or equity sense, is meaningful with respect to the debtor's financial condition for the purpose of § 523(a)(2). Congress therefore used a broad term, "financial condition" that encompasses insolvent in both senses. It did not restrict "solvency" to a balance sheet test for purposes of § 523(a)(2).

Because "financial condition" includes solvency in the equity sense, it follows that statements about assets are direct statements of (not just "respecting") financial condition. When the import of the statement is having the wherewithal to repay debt, it is an assertion of solvency in the equity sense. And that is *exactly* what Respondent is accused of asserting in the instant case. His purported assertions that he would be receiving a $100,000 tax refund, allegedly made both before and after he received a tax refund, were assertions that he was solvent

in the equity sense, i.e., able to pay his debt.[10] In the circumstance, that was not just a statement "respecting" financial condition, it was a statement *of* Respondent's financial condition.

Accordingly, and as an alternative ground to the ruling below, Respondent's alleged misrepresentation is of his financial condition (not merely "respecting" it) and falls squarely within the ambit of § 523(a)(2)(B) without need to explicate the term "respecting." And, since the alleged misrepresentation was not in writing, the debt is dischargeable.

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[10] His alleged lie that he had not yet received a tax refund when he had actually received it still falls into this category; it still amounts to a claim that he can pay his debt. Notably, in yet another example of conflicting testimony, Appling testified that he truthfully revealed that he had actually received the tax refund. JA 114.

CONCLUSION

For the foregoing reasons, as well as those set forth in Respondents' Merits Brief, Amici respectfully submit that the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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